What You Can and Can't Say to Jurors: Before, During, and After Trial

Jacob R. Lines, Pima County Attorney's Office
APAAC Summer Conference
June 16, 2016

I. Before Trial

General Principles

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

"Disseminating information to the public enhances, within the communities served by the prosecutor's office, confidence in and understanding of his governmental mission." *Wright v. Grove Sun Newspaper Co.*, 873 P.2d 983, 988 (Okla. 1994).

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252, 271 (1941).

ER 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official of a tribunal by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct likely to disrupt a tribunal.

COMMENT [2003 RULE]

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, court-appointed arbitrators, masters or jurors, unless authorized to do so by law or court order. Lawyers should refer to the Code of Judicial Conduct, Rule 2.9 for authorized ex parte communications.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See ER 1.0(m).

[6] At times, a government entity is required to act in a "quasi-judicial" capacity as part of an administrative process. In that capacity, it may act as the decision-maker in contested proceedings or hear appeals from the determinations of another officer, body or agency of the same government. A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact, provided that reasonable measures are taken to ensure the fairness of the administrative process, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer's advice to the tribunal to procedural matters. In no event can the same lawyer both provide advice to the tribunal and appear before it in the same matter, even if the advice is limited to procedural advice.

ER 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT [2003 AMENDMENT]

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. ER 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and that should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement

explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See ER 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

ER 3.8. Special Responsibilities of a Prosecutor

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

What about public records?

"Simply handing over public records to reporters without comment is not necessarily an "extrajudicial statement." Furthermore, the contents of public records are generally exempt from the foregoing ethical restrictions. See E.R. 3.6(c)(2). Nothing we say here should be taken to mean that a public official is free to release investigative reports or other public records with impunity.

Cox Arizona Publications, Inc. v. Collins, 175 Ariz. 11, 14-15, 852 P.2d 1194, 1198-99 (1993).

Public records law recognizes that the government can protect some information based on "important public policy considerations relating to protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state."

Carlson v. Pima County, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984).

Rule 3.6(c) – defending a client

So, who is our client? Look at *State ex rel. Romley v. Superior Court (Flores)*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995).

II. During Trial:

NDAA Standards are attached.

III. After Trial:

Ariz. R. Crim. P. 18.3:

Prior to the voir dire examination on the day when jury selection is commenced, the parties shall each be furnished with a list of the names of the panel of prospective jurors called for the case together with the zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status as to each potential juror within a specified time schedule as established by the jury commissioner, if one is utilized, or the court, if one is not. The jury commissioner shall obtain and maintain such information as to each potential juror in a manner and form to be approved by the supreme court, but **all information obtained shall be limited to use for the purpose of jury selection only**. **The court shall keep all jurors' home and business telephone numbers and addresses confidential unless good cause is shown to the court** which would require such disclosure.

Ariz. R. Crim. P. 22.5:

When dismissing a jury at the conclusion of the case, the court shall advise the jurors that they are discharged from service and, if appropriate, release them from their duty of confidentiality and explain their rights regarding inquir[i]es from counsel, the media, or any person.

State v. Paxton, 145 Ariz. 396, 701 P.2d 1204 (App. 1985):

Paxton was convicted of arson. At the time of the verdict, the jury was polled. The judge ordered that there be no contact or communication with the jurors except upon motion with an affidavit showing good cause for contact. The defendant filed a motion with an affidavit, asking to interview the jurors because two jurors were visibly upset after the verdict; one of them was crying. The trial court denied his motion.

On appeal, Paxton claimed that he had the inherent right to interview jurors under Rule 24.1, that public policy supported his motion, and that the constitutional right to an impartial jury requires a right to interview jurors.

The Court of Appeals rejected these arguments. First, Rule 24.1 sets forth the grounds for a new trial based on jury misconduct. None of those grounds were supported by the affidavit, so further investigation through interviews was not warranted. The court rejected without elaboration the public policy and constitutional arguments.

Because the affidavit "was speculative at best and does not provide sufficient grounds to warrant further investigation," the trial court did not abuse its discretion in denying the interviews.

State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972):

Fassler stands for the proposition that a trial court does not have to poll the jury about possible violations of the court's admonitions if there is no evidence at all that any juror violated the admonition. It quoted with approval some good language from a Minnesota case: "When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition, without a vestige of proof of its violation, provides no basis upon which a court of review can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct."

State v. Ruiz, 1 CA-CR 96-0940, 1998 WL 436557 (Ariz. Ct. App. Aug. 4, 1998) was depublished, possibly because this part was incorrect, but we should be aware of it:

> ¶ 30 The final issue is the trial court's decision to preclude post-trial interviews of the jurors. Prior to jury deliberations, the trial court directed counsel not to conduct post-trial interviews of the jurors. Defendant argues that this was error, and we agree.
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> ¶ 31 While the court may deny a motion to interview or poll the jurors on a particular subject (see State v. Fassler, 108 Ariz. 586, 595-96, 503 P.2d 807, 816-17 (1972)) or condition the right to interview on an affidavit showing good cause (see State v. Paxton, 145 Ariz. 396, 397, 701 P.2d 1204, 1205 (App.1985)), a blanket denial of a party's ability to interview without apparent cause goes too far. No reason appears in the record for such a broad proscription. Arizona Rule of Criminal Procedure 24.1(c)(3), which allows evidence of juror misconduct as grounds for a new trial, implies that defendants may interview jurors. Accordingly, we vacate the trial court's order barring Defendant from interviewing jurors.[10]
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> n.10: Defendant does not argue any specific instance of misconduct but our disposition will allow him to interview the jurors who consent to such interviews. If any specific instance of misconduct is found, Defendant may proceed under Rule 32.

The lesson from *Ruiz* is to make a good record of why such an order is necessary and to make sure that the trial court does not go too far without good reason.

Hall v. State, 151 Idaho 42, 48, 253 P.3d 716, 722 (2011):

This case is excellent persuasive authority on this question. In this case, the trial court ordered the defense to have no contact with the jurors in the case without permission from the trial court. The defense filed a motion to interview jurors, which the court denied.

On appeal, the Idaho Supreme Court first held that the trial court had the inherent authority to issue such an order. It then examined Supreme Court precedent and held that

> Attorneys' limited First Amendment rights implicated by an order prohibiting post-verdict juror contact absent a court order, are outweighed by the public policy interests in preserving a full and fair trial, protecting juror privacy and protecting the finality of verdicts. Therefore, we hold that the district court did not err in using its inherent authority to enter an order prohibiting post-verdict juror contacts absent a showing of good cause to believe that juror misconduct occurred.

Finally, the court held that the trial court did not abuse its discretion in denying Hall's motion for post-verdict juror contact because he failed to provide any evidence suggesting that any impropriety had occurred.